

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BARRY CHOYCE,

Petitioner,

v.

No. CV 11-0450 JCH/GBW

FNU MARTIN, Warden, and
the ATTORNEY GENERAL OF
THE STATE OF NEW MEXICO,

Respondents.

**MEMORANDUM OPINION AND ORDER DISMISSING CASE WITHOUT
PREJUDICE**

THIS MATTER comes before the Court on the Magistrate Judge's Proposed Findings and Recommended Disposition, filed October 4, 2011 (*Doc. 8*) ("PFRD"). In his PFRD, the Honorable Gregory B. Wormuth, United States Magistrate Judge, found that Petitioner Barry Choyce's federal habeas application was "mixed," containing both exhausted and unexhausted claims. *See* PFRD at 1-2. He recommended that Petitioner be given an opportunity to either delete his unexhausted claims or return to state court to present his unexhausted claims. *See* PFRD at 13. Judge Wormuth put Petitioner on notice that, if the District Court adopted his recommendations and Petitioner failed to submit a one-page certificate signifying the deletion of his unexhausted claims within the required time limit, the District Court could dismiss his habeas application, and the

statute of limitations¹ in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.) (“AEDPA”), would apply to all claims in his Petition. *See* PFRD at 13.

Petitioner filed no objections to the PFRD.

The Court filed an order adopting Judge Wormuth’s PFRD. *See* Order Adopting Magistrate Judge’s Proposed Findings and Recommended Disposition, November 1, 2011 (*Doc. 10*) (“Order Adopting PFRD”).

In that order, the Court explained that it agreed that some of Petitioner’s claims were unexhausted.


The Court instructed Petitioner that, if he wished to proceed with his application in federal court, he had thirty days to submit a one-page certificate stating that he had elected to delete the unexhausted claims. *See* Order Adopting PFRD at 2.

The Court further warned Petitioner that, if he failed to file a certificate deleting his unexhausted claims within thirty days of the Court’s Order Adopting PFRD, the Court would deem him to have elected to return to state court to present his unexhausted claims and the Court would dismiss his Petition. *See* Order Adopting PFRD at 2. Petitioner’s certificate was due on December 1, 2011. To date, Petitioner has not filed any certificate with the Court, and there is nothing in the record indicating that the Order Adopting PFRD was not delivered.

¹ 28 U.S.C. § 2254(d).

Instead of filing the document the Court discussed in its Order Adopting PFRD, Petitioner filed no further documents. Therefore, the Court deems Petitioner to have elected to return to state court to present his unexhausted claims. The Court will dismiss his Petition without prejudice.

Wherefore, **IT IS HEREBY ORDERED THAT:** Petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254 is dismissed without prejudice on the grounds that it contains unexhausted claims.



JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE